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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

44 LIQUORMART, INC.,

Petitioner,

—v.—

THE STATE OF RHODE ISLAND *ET. AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER SUBMITTED BY THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.; THE NATIONAL ASSOCIATION OF BROADCASTERS; AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

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Interest of Amici Curiae

The Association of National Advertisers, Inc., (A.N.A.), the National Association of Broadcasters (NAB), and the American Association of Advertising Agencies (A.A.A.A.) respectfully submit this brief *amici curiae* in support of petitioner. Written consents to its filing have been granted by the parties and filed with the Clerk of the Court.

The Association of National Advertisers, Inc., (A.N.A.), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 5,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for a significant percentage of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

The National Association of Broadcasters (NAB), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB seeks to preserve and enhance its members' ability to disseminate freely information concerning commercial activities, the activities of government and other matters of public concern. NAB and its members oppose the use of government censorship of truthful information about lawful activity as a tool to manipulate the behavior patterns of the American public.

The American Association of Advertising Agencies (A.A.A.A.) is the national trade association of the advertising agency industry, representing more than 650 advertising agencies throughout the United States. Members of A.A.A.A. create and place approximately 80% of all national advertisements, as well as significant portions of regional and local advertising. A.A.A.A. is dedicated to the preservation of a robust free market in commercial ideas.

Introductory Statement and Summary of Argument

I.

Serious constitutional questions are posed whenever a state seeks to impose price controls, even through democratic means. See *infra* at n.12. This case raises the related, and easier, question of whether censorship of truthful information about prices may be used to impose *de facto* price controls without full democratic discussion. Amici believe that government may never bypass the democratic process by using censorship as an indirect method of exercising its substantive powers.

Whatever merit differentiating between commercial and non-commercial speech may have in other contexts[1], *amici* believe that it would be wrong to do so in this case. For, while truthful price advertising clearly falls within the Court's technical definition of commercial speech[2], Rhode Island's censorship scheme does far more than merely interfere with a commercial transaction. Rather, it cloaks a controversial political judgment—whether or not to impose price controls—and screens the judgment from democratic review. Since, in politics, as in baseball, you can't hit what you can't see, Rhode Island's censorship scheme strikes at the heart of a citizen's right to know in its most deeply political sense. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976). Accordingly, Rhode Island's attempt to ban truthful speech about prices should be

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[1] Justice Stevens has consistently warned that any effort to treat commercial speech differently from its non-commercial cousin should be based on a careful functional analysis of the justification for greater regulation. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1594-96 (Stevens, J. concurring).

[2] For efforts to define commercial speech, see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Central Hudson*, 447 U.S. at 561-566, and n.5; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-68 (1983); *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-75 (1989); and *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1511-13 (1993).

measured by stringent First Amendment norms designed to protect the political process. *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkley, Cal.*, 454 U.S. 290 (1981).

II.

Measured under the commercial speech doctrine, moreover, Rhode Island's censorship scheme fails each prong of the *Central Hudson* test. It fails to advance a substantial governmental interest; fails to directly and materially advance the state's asserted interest in fostering temperance; and ignores less drastic means of advancing the state's interest.

A.

Although Rhode Island claims that its censorship scheme is designed to advance "temperance", which Rhode Island authorities equate with the responsible use of alcohol, substantial evidence exists that a desire to shield small *intra*-state retailers from price competition by larger stores is the statute's dominant purpose. See 39 F.3d at 7-8; *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985); *Id* at 342 n.10 (R.I. 1985) (Murray, J., dissenting). Such an interest in economic protectionism does not qualify as "substantial" within the meaning of *Central Hudson*. Indeed, it violates the Commerce Clause. In light of the strong evidence of improper motive, including the candid admission by the Rhode Island State Liquor Association that economic protectionism is a significant goal of the statute, the First Circuit clearly erred in refusing to require Rhode Island to demonstrate that promotion of temperance is the statute's dominant purpose. *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977) (presence of improper purpose places burden on censor to show that would have acted identically in absence of improper motive).

Moreover, even if one takes at face value Rhode Island's assertion that preventing irresponsible alcohol use is the statute's goal, Rhode Island does not have a legitimate interest in fostering its goals through state-mandated ignorance. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1596 (Stevens, J., concurring).

B.

Rhode Island has failed to demonstrate that censoring truthful information about prices will, in fact, materially diminish irresponsible alcohol consumption. *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). Both lower courts found that, at most, Rhode Island has demonstrated a "reasonable" basis for hoping that banning price advertising will diminish alcohol consumption. 39 F.3d at 7-8; 829 F. Supp. at 549; 554.[3] While such a "reasonable" basis might be sufficient to regulate behavior, the essence of First Amendment protection obliges a would-be censor to do more than demonstrate that censorship is reasonable. *Turner Broadcasting Co. v. F.C.C.*, 114 S.Ct. 2445 (1994); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993). Compare *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993) (regulating behavior) with *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (regulating speech). See generally, *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101 (1993). In order to carry its burden of justification, Rhode Island must, at a minimum, demonstrate that censorship of price advertising will, in fact, materially reduce irresponsible alcohol consumption. The courts below are in agreement that Rhode Island failed to make such a showing.

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[3] Indeed, the District Court found as a fact that the censorship scheme does not materially diminish alcohol consumption. 829 F.Supp. at 549.

C.

Finally, several alternatives exist that would minimize censorship. Most obviously, Rhode Island may attempt to regulate minimum price levels for alcohol openly, as it has already done for cigarettes.[4] See R.I. Gen. Laws, 6-13-2. More constructively, Rhode Island could seek to deal effectively with problem drinking by enacting serious measures providing for education, treatment and law enforcement. Rhode Island's failure to explain why such obvious non-censorship alternatives were ignored constitutes an independent ground for invalidating the statute. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1593-94 (1995).

Statement of the Case

Rhode Island attempts to regulate the retail prices of both cigarettes and beverages containing alcohol.[5] But, while cigarette price fixing is administered openly through legislation setting a minimum floor,[6] Rhode Island seeks to regulate beverage prices without the inconvenience of an open political debate. Instead, Rhode Island seeks to keep prices artificially high by forbidding retailers from disseminating truthful information to consumers about price.[7]

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[4] *Amici* believe that any effort to impose price control by democratic means would (and should) be soundly rejected by the people of Rhode Island, since it tampers with the market without meaningfully confronting problem drinking.

[5] The constitutionality of Rhode Island's substantive effort to regulate prices is not before the Court. Were Rhode Island to attempt to fix the price of beverages containing alcohol openly, it would raise serious questions under the Commerce Clause. The issue posed by this case is whether Rhode Island can bypass the democratic process by using censorship to achieve *de facto* price control.

[6] R.I. Gen. Laws 6-13-2.

[7] R.I. Gen. Laws 3-8-7, the statute at issue in this appeal, was enacted in 1956. See also, R.I. Gen. Laws 3-8-8.1, extending the ban on

Rhode Island claims that its price advertising ban is designed to keep retail cost artificially high in the hope of fostering "temperance".[8] While the word "temperance" is not defined in the statute, Rhode Island authorities apply it to mean the responsible use of alcohol, as opposed to the more extreme historical usage associated with complete prohibition.[9] The Rhode Island Liquor Store Association candidly admits that the censorship scheme is intended, as well, to insulate small retailers from price competition.[10] See *S&S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985).

A threshold issue in this case, therefore, is whether a legislature wishing to keep prices artificially high may impose *de facto* price control without an open vote on the intensely controversial issue by the simple expedient of censoring truthful price information. The question is of considerable importance to the democratic process, since the issue of whether to fix prices for goods and services remains a matter of intense

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price advertising to any communication making "reference to the price of any alcoholic beverage". The breadth of the Rhode Island ban is demonstrated by the conviction of petitioner for using the word "WoW" in a newspaper advertisement. 39 F.3d at 6. Rhode Island authorities found that the word connoted a favorable price and imposed a $400 fine for its use.

[8] See 39 F.3d at 6. The statute's "asserted" purpose is "the promotion of temperance" and "the reasonable control of the traffic in alcoholic beverages". See R.I. Gen. Laws 3-1-5. Despite doubts, the Rhode Island courts chose to accept the "asserted" purpose at face value. *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985).

[9] The difference is potentially important, since a precise articulation of the state's interest is a precondition to the accurate application of *Central Hudson*.

[10] The intervenors argued below that the advertising ban was intended to protect small retailers from price competition by "giants". See 39 F.3d at 8.

political disagreement. *Yee v. Escondido, California*, 503 U.S. 519 (1992); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkley, Cal.*, 454 U.S. 290 (1981). Only if censorship of truthful price information may be used as an end-run around the political process is it necessary to ask whether Rhode Island's censorship scheme violates the commercial speech doctrine.

With respect, *amici* suggest that the First Circuit appears to have overlooked the threshold issue. The First Circuit simply assumed that government may substitute censorship of price information for an open, democratic judgment that price fixing is warranted. But, whatever one's views concerning the predictive value of the Rube Goldberg causal chain underlying Rhode Island's censorship scheme,[11] a critical prior question is whether Rhode Island may seek to use censorship of truthful information about prices to achieve covertly what it lacks the political will to do openly—fix prices of beverages containing alcohol at an artificially high level.

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[11] *Amici* believe that the court below seriously misapplied the *Central Hudson* requirement that all efforts to censor truthful commercial speech be shown to "directly and materially advance" a substantial government interest. See *infra*, at 24-29.

I. CENSORSHIP OF TRUTHFUL INFORMATION ABOUT PRICES MAY NOT BE USED AS AN INDIRECT METHOD OF IMPOSING PRICE CONTROL

A. Rhode Island's Use of Censorship to Impose *De Facto* Price Control Bypasses the Democratic Process and Suppresses Information Needed to Form an Important Political Judgment

No economic issue has triggered more intense disagreement than government efforts to impose price control.[12] While the Court's price control cases do not definitively determine the constitutionality of price controls in all settings, they do definitively demonstrate the enduring—indeed, unique—political controversy that has swirled around the issue throughout our history.

Given the intensely controversial nature of price control, *amici* believe that a decision to fix prices must, at a minimum, be made openly after full opportunity for democratic reflection.[13] Unfortunately, Rhode Island's decision to impose

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[12] Eg. *Munn v. Illinois*, 94 U.S. 113 (1877) (upholding railroad rate regulation); *Houston E. & W. Texas Ry. Co. v. United States* (the Shreveport Rate Case), 234 U.S. 342 (1914) (same); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating effort to fix gasoline prices); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (invalidating effort to fix re-sale price of theater tickets, overruled by *Gold v. DiCarlo*, 380 U.S. 520 (1965) (per curiam); *Ribnik v. McBride*, 277 U.S. 350 (1928) (invalidating ceiling on employment agency fees), overruled by *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding minimum price for milk); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding minimum price for coal); *West Coast Hotel Co. v Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation, overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986) (upholding rent control against anti-trust challenge); *Yee v. Escondido, California*, 503 U.S. 519 (1992) (declining to address whether mobile home rent control constitutes regulatory taking).

[13] As *amici* have noted, even democratically sanctioned efforts to impose price controls will often raise serious constitutional questions. See *infra* at n.12.

price controls indirectly by censoring truthful information about prices seriously impedes democratic reflection in two ways. First, censorship of truthful information about prices acts as a wide-ranging restriction on the very information that citizens need in order to determine whether price controls are warranted. While the precise application of the prior restraint doctrine to commercial speech remains to be elaborated, *Lowe v. S.E.C.*, 472 U.S. 181 (1985), when, as here, systematic censorship blocks the free circulation of information needed to make an important political judgment, the censorship scheme should be tested by First Amendment norms designed to protect the political process. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. 530 (1980).

Second, regulating prices indirectly through censorship permits legislators to avoid both a clear statement and an open debate on the issue. Instead, the controversial political decision is shrouded in ambiguity and shielded from public scrutiny. If the Rhode Island legislature had used vague and imprecise language to impose price control, doctrines like the "clear statement" rule,[14] the "void-for-vagueness" doctrine,[15] and the prohibition on undue delegation[16] would operate to force the legislature to make the important political decision openly, after full debate and in a manner subject to democratic review. *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952) (decision to regulate labor market must be made by legislature, not President, because it requires full political debate). Surely, an effort to use censorship to achieve the same result must be subjected to similar scrutiny. Thus, while price advertising is classically commercial in nature,

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14 *Kent v. Dulles*, 357 U.S. 116 (1957).

15 *Smith v. Goguen*, 415 U.S. 566 (1974).

16 *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Rhode Island's censorship scheme strikes at a citizen's right to know in its most deeply political sense.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court unequivocally held that censorship of truthful price information may not be used as a back-door means of fixing prices. In *Virginia Pharmacy*, the Court invalidated a Virginia ban on advertising the price of prescription drugs. Virginia argued that its ban was necessary to stabilize prices in order to assure a competent and effective pharmaceutical distribution network. In words that are particularly relevant to this case, Justice Blackmun, writing for the Court, held that censorship of price information not only deprives consumers of important information needed to make rational economic decisions, but also denies the public the information needed to make a political judgment about whether a particular market should be regulated at all. 425 U.S. at 764-65. The *Virginia Pharmacy* Court recognized that suppressing price information in order to control prices bypasses the democratic process and begs the very question of whether price regulation is appropriate.

Similarly, in *Bates v. State of Arizona*, 433 U.S. 350 (1977), the Court invalidated an Arizona ban on advertising the price of routine legal services, noting once again that suppression of truthful information about price deprives the public of important information about the need (or the lack of need) for regulation. 433 U.S. at 364.[17]

In the two decades since *Bates* and *Virginia Pharmacy*, the Court has grappled with a series of complex commercial speech issues, but it has never wavered from its fundamental

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[17] The major issue in *Bates* was whether price advertising of routine legal services was inherently misleading. Once the Court determined that it was not, the Court made short work of the argument that censorship of price advertising was an appropriate way to regulate prices. 433 U.S. at 377.

judgment that price fixing may not be imposed indirectly through censorship. Now, as in *Virginia Pharmacy*, using censorship as a *de facto* road to price control short-circuits the democratic process, corrodes the operation of a market economy, and manipulates consumers as if they were wayward children.[18]

No basis exists to depart from the holding of *Virginia Pharmacy* because the product is alcohol rather than prescription drugs. Courts that have upheld efforts to censor truthful information about the price of alcohol[19] have rested their

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[18] Since *Virginia Pharmacy*, the lower courts have been virtually unanimous in rejecting efforts to use censorship as a back door means of regulating prices. Eg. *Bloom v. O'Brien*, 841 F.Supp. 277 (D. Minn. 1993) (enjoining ban on itemizing gross revenue tax on patient bills); *South Ogden CVS Store, Inc. v. Ambach*, 493 F. Supp. 374 (S.D.N.Y. 1980) (invalidating ban on pharmacist advertising 10% discount for senior citizens); *Louisiana Consumers League, Inc. v. Louisiana State Board of Optometry Examiners*, 557 F.2d 473 (5th Cir. 1977) (invalidating ban on advertising price of prescription eyeglasses); *Wall & Ochs, Inc. v. Hicks*, 469 F. Supp. 873 (E.D.N.Car. 1979) (ban on advertising price of prescription eyeglasses "patently unconstitutional"); *Michigan Beer & Wine Wholesalers Ass'n v. Attorney General of Michigan*, 142 Mich. App. 294, 370 N.W. 2d 328 (1985), *cert. denied*, 479 U.S. 939 (1986) (invalidating ban on advertising retail liquor prices); *Stroh Brewery v. Walp*, Civ. Action No. 1:CV-93-937 (M.D. Pa. 1994) (non-coercive speech about liquor prices protected by First Amendment); *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 422 N.Y.S. 33, 397 N.E. 2d 794 (1979) (invalidating ban on signs advertising gasoline prices); *Phoenix Mutual life Insurance Co. of New York v. Insurance Department*, 500 F.Supp. 2 (S.D.N.Y. 1980) (ban on truthful advertising of "low cost" insurance violates First Amendment); *Motor Vehicle Mfgs. Assoc. v. Abrams*, 684 F.Supp. 804 (S.D.N.Y. 1988), rev'd in part, 899 F.2d 1315 (2d Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) (invalidating ban on disclosing price impact of compliance with state law) Cf. *Harry & Bryant Co. v. FTC*, 726 F2d 993 (4th Cir.), *cert. denied*, 469 U.S. 820 (1984) (FTC may require itemized price lists for funeral services).

[19] In addition to the court below, several courts have ruled that regulation of alcohol under the 21st Amendment poses a virtually unique setting in which states may ban price advertising. *Queensgate Investing Co. v. Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E.2d 138, app.

opinions on two shaky props—an argument that the 21st Amendment erodes First Amendment protections in the area of state regulation of alcohol; and an assumption that the "greater" power to ban a product necessarily carries with it a broad "lesser" power to use censorship to discourage the practice. Neither argument can withstand analysis. Indeed, both props were conclusively rejected in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995).

B. The 21st Amendment Does Not Empower Rhode Island to Use Censorship to Fix Prices

Prior to Prohibition, the Supreme Court had held that a state lacked inherent power under its police power to regulate interstate commerce in alcohol. *Leisy v. Hardin*, 135 U.S. 100 (1890). In 1913, Congress sought to grant the necessary power by enacting the Webb-Kenyon Act. See *Clark Distilling Co. v. Western Md. Ry.*, 212 U.S. 311 (1917). Passage of the 18th Amendment made the issue moot. With the repeal of National Prohibition,[20] however, section 2 of the 21st Amendment was enacted to assure that the dormant Commerce Clause would not stand in the way of democratic political judgments to continue Prohibition at the state level.[21] Thus, the 21st Amendment grants the states power to make an

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dismissed, 459 U.S. 807 (1982); *Dunagin v. City of Oxford, Mississippi*, 718 F2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259 (1984); *S&S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc.*, 650 A.2d 854 (Pa. 1994). See also, *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), rev'd on other grounds, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

[20] Ironically, Rhode Island never ratified the 18th Amendment and was among the first states to ratify the 21st.

[21] The 21st Amendment expressly provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

intensely controversial political judgment that might, otherwise, be blocked by the Commerce Clause. See *Edwards v. California*, 314 U.S. 160 (1941).

The corollary of such a grant of extraordinary power is that it must be exercised, if at all, only after full political debate and in strict compliance with the Constitution. Not surprisingly, this Court has repeatedly ruled that, far from authorizing an erosion of First Amendment rights, the extraordinary nature of the power granted by the 21st requires scrupulous compliance with the rest of the Constitution. In *Craig v. Boren*, 429 U.S. 190 (1976), for example, the Court explicitly rejected an argument that the 21st Amendment eroded the force of the Equal Protection Clause. In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Court explicitly rejected an argument that the 21st Amendment altered the norms governing preemption of state efforts to regulate advertising. In *Healy v. The Beer Institute*, 491 U.S. 324 (1989) and *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), the Court rejected the argument that the 21st Amendment permitted states to fix prices by requiring an affirmation that in-state prices were no higher than prices in other states. In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Court rejected an argument that the 21st Amendment eroded the protections of the Establishment Clause. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court rejected an argument that the 21st Amendment weakened procedural due process guarantees. See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (invalidating under Sherman Act statute authorizing private enforcement of minimum prices); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (invalidating under Sherman Act requirement that wine retailers abide by privately set minimum prices). Most recently, in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995), the Court held that, when states seek to regulate alcohol advertising under the 21st Amendment, they are held "to

the same First Amendment restrictions that apply to the Federal Government." 115 S.Ct. at 1591. Since the 21st Amendment certainly does not enhance the power of the federal government to censor, *Coors* makes it clear that the 21st Amendment does not enhance the power of the states to suppress truthful speech. Justice Thomas' opinion in *Coors* also makes it clear that *California v. LaRue*, 409 U.S. 109 (1972) and its progeny[22] do not support the claim that the 21st Amendment erodes First Amendment rights. *LaRue* upheld the power to ban nude dancing in places where alcohol was served. Since this Court ruled in *Barnes v. Glen Art Theater*, 501 U.S. 560 (1991) that the nude dancing at issue in *LaRue* was not entitled to First Amendment protection, Justice Thomas' observation in *Coors*[23] puts an end to the effort to parlay *LaRue* into a broad authorization to censor truthful commercial speech under the 21st Amendment.

Thus, the 21st Amendment provides no support for the proposition that price controls over alcohol may be introduced covertly via censorship. If anything, the extraordinary nature of the power granted by the 21st Amendment argues that it be exercised openly and only after full political debate.

C. The "Greater" Power to Ban Alcohol Does Not Carry With It a So-Called "Lesser Power" to Ban Truthful Speech About Prices

Nor does the second prop fare any better. Some courts have suggested that the controversial nature of a product carries

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22 *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986).

23 Justice Thomas observed:

> Nor does *LaRue* support the Government's position. *LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served. 409 U.S. at 414. 115 S.Ct. at 1590 n.2.

with it a broad power to censor information about it.[24] However, the notion, expressed in dictum in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 346 (1986), that the "greater" power to ban an activity carries with it a "lesser" power to regulate it free from the usual constitutional constraints has been repeatedly rejected by this Court.[25] Most importantly, the dictum in *Posadas* was unanimously repudiated in *Coors*. 115 S.Ct. 1589-90 n.2. After *Coors*, it is now clear that censorship of truthful commercial speech cannot be justified as an incident of a power to prohibit the activity in question.

It was argued in dictum in *Posadas* that censoring commercial speech about an activity is a less drastic government response than direct regulation. But such an argument misconstrues a fundamental postulate of a democratic society—the importance of open political decision-making. While banning an activity is an obvious interference with autonomous choice, the interference occurs openly, and only after a full political debate. Regulation of speech in an effort to manipulate behavior is a far more "drastic" event, since it often affects behavior in a covert manner. It can leave citizens with the illusion of freedom, but the reality of government control. In this case, it has left the citizens of Rhode Island with *de facto* price control over beverages containing alcohol without the "formality" of an up-or-down vote on the question and without ready access

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[24] One of Rhode Island's principal arguments in the lower courts was that the power to ban alcohol necessarily carried with it the power to censor price information. See 39 F.3d at 6.

[25] *Cleveland Board of Education v. Loudermill*, 470 U.S. 523 (1985); *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984). Compare, *Arnett v. Kennedy*, 416 U.S. 134 (1974) (opinion of Justices Rehnquist, Stewart and Chief Justice Burger) with *Id* at 167 (opinion of Justices Powell and Blackmun); *Id* at 185 (opinion of Justice White); *Id* at 211 (opinion of Justices Marshall, Brennan and Douglas). See generally, Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989); Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. Rev. 4 (1988).

to the information about price levels needed to determine whether price control should be continued.

II. RHODE ISLAND'S EFFORT TO DENY CONSUMERS ACCURATE INFORMATION ABOUT A PRODUCT THEY ARE ABOUT TO BUY VIOLATES THE COMMERCIAL SPEECH DOCTRINE

In Point I, *amici* argue that Rhode Island's censorship scheme is so closely bound up with the fundamental political decision of whether to impose price controls that its constitutionality should be measured by First Amendment standards designed to protect the political process. See *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1594 (1995) (Stevens, J. concurring); *Bigelow v. Virginia*, 421 U.S. 809 (1975). If, however, the Court elects to analyze Rhode Island's scheme under the commercial speech doctrine, the ban on truthful price advertising fails every prong of the *Central Hudson* test.

The court below erroneously treated the *Central Hudson* test as if it were a radical exception to First Amendment jurisprudence.[26] In fact, the principal difference between First Amendment protection of commercial and non-commercial speech lies in the first prong of *Central Hudson*.[27] The doc-

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[26] For example, the court below took the state's asserted interest in promoting temperance at face value, despite its articulated suspicion that the statute was motivated, at least in part, by a desire to shield small retailers from price competition. 39 F.3d at 8. Similarly, in testing whether the statute directly and materially advanced temperance, the court applied a permissive, rational basis standard more suitable for testing regulation of behavior than censorship of truthful speech. 39 F.3d at 7-8. Finally, the court below simply refused to consider the availability of numerous less drastic alternatives. 39 F.3d at 8. In fairness, the court below did not have the benefit of this Court's unanimous opinion in *Coors Brewing Company* directing that less drastic means be explored.

[27] While accuracy and lawfulness are conditions of commercial speech protection, it is an article of faith in the non-commercial area that there is no such thing as "official" truth. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

trinal differences, if any, are far smaller at the level of the second, third and fourth prongs. In both commercial and non-commercial settings, a would-be censor must persuade a reviewing court that the governmental interest is sufficiently important; that the censorship will actually play a direct and material role in advancing the government's interest; and that adequate alternative means of advancing the state's interest do not exist.

When applied with the requisite rigor demanded by a First Amendment analysis, Rhode Island's scheme fails all three tests.

A. Consumers Have a First Amendment Right to Uncensored Information About the Lawful Products They Are About to Buy.

The key to a generation of commercial free speech cases in this Court is respect for a consumer's right to receive uncensored, accurate information about lawful consumer choices. Despite claims that the free flow of commercial information would cause substantial harm, ranging from the undermining of neighborhood pharmacies[28]; to interference with efforts to maintain integrated neighborhoods;[29] to erosion of the moral fiber of the young,[30] this Court has repeatedly recognized that a consumer-driven, free market economy cannot function in the absence of a free flow of uncensored, truthful commercial information. Just as a functioning political democracy requires the free flow of information needed to make informed political choices, a functioning market economy is dependent on informed choice by autonomous consumers.

Thus, in the 19 years since the Court explicitly recognized in *Virginia Pharmacy* that commercial speech is entitled to

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28 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

29 *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977).

30 *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977).

First Amendment protection, it has repeatedly upheld the consumer's right to receive accurate, uncensored commercial information relevant to the making of a lawful economic choice.[31]

In fact, censorship of commercial speech has been upheld by this Court only when the speech would not assist the consumer in making an informed, lawful choice, or where special circumstances require a narrowly tailored, temporary restriction. Thus, where a commercial speaker solicits a consumer to engage in unlawful activity, the speech is not protected by the First Amendment because the consumer's choice is not a lawful one. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (gender-typed want ads not protected).[32]

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[31] E.g. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976) (price information concerning prescription drugs); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, 96-97 (1977) (information on availability of real estate); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (information about birth control devices); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) (information on price and availability of routine legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980) (information on availability of electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (information on availability of legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (commercial information in the mails about birth control); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (information on availability of legal services); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 110 & n.18 (1990) (same); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (face-to-face information about accountant's services); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994) (accurate information concerning lawyers' qualifications); *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995) (accurate information concerning alcohol content).

[32] *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993), is a complex application of the *Pittsburgh Press* principle. In *Edge Broadcasting*, the United States keyed the legality of broadcast advertisements for state lotteries to whether the activity was lawful in the state

Similarly, where commercial speech is shown to be false or misleading, the speech may be forbidden because it actually impedes consumers in making the informed and autonomous choice on which a free market depends. *Friedman v. Rogers*, 440 U.S. 1 (1979) (ban on misleading trade names).

Finally, where special circumstances are shown to require it, commercial speech may be regulated by a narrowly tailored rule designed to protect the consumer without interfering with the free flow of information. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (face-to-face solicitation of accident victims); *Board of Trustees of the State University v. Fox*, 492 U.S. 469 (1989) (solicitation of students by strangers in college dormitory); *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (U.S.) (30 day moratorium on targeted mail solicitation of accident victims). But see *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (face-to-face solicitation of business executives by CPA's protected). Thus, whether one focuses on the many cases upholding commercial free speech claims, or on the handful of settings in which commercial free speech has been regulated, the Court's central concern has been the consumer's right to receive information needed to make an informed and autonomous choice.

B. Rhode Island Has Not Asserted an Interest of Sufficient Magnitude to Override the Consumer's Right to Know

Both the Administrator of the statute[33] and the intervening defendants[34] concede that Rhode Island's price advertising

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from which the speech was transmitted. Thus, *Edge Broadcasting* is inapplicable to truthful speech about concededly lawful economic choices.

[33] At a hearing held in connection with petitioner's use of the word "wow" in an advertisement, the Administrator of the Liquor Control Administration, candidly stated:

> "I know both 44 and Douglas are well aware that there are some tremendous concerns at the time of licensing. Many people said they were a chain, they were going to be able to take over the

(footnote 34 appears on next page)

ban is intended, at least in part, to prevent large chains from subjecting small retailers to price competition. See 39 F.3d at 7-8; *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985); *Id* at 342 n.10 (Murray, J., dissenting). Such an effort to use censorship to aid one set of economic competitors against another is not merely an insubstantial interest, it is patently illegitimate. At best, therefore, Rhode Island is in the posture of a "mixed motive" censor, where censorship has been motivated by both a permissible and an impermissible motive. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (when permissible and impermissible motives present, government censor must prove that it would have acted identically even in absence of improper motive). Accordingly, the First Circuit clearly erred in declining to require Rhode Island to demonstrate that the dominant purpose of the statute is promotion of responsible alcohol use, not protection of small retailers.[35]

Moreover, even if one accepts at face value Rhode Island's claim to be promoting temperance through state-imposed censorship, an interest in consumer ignorance does not even qualify as "legitimate", much less as "substantial". The "temperance" that Rhode Island seeks to promote is a metaphor for

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liquor industry in the state of RI. There was a genuine fear that set in among the liquor establishments."

[34] The intervenors repeatedly asserted as a basis for intervention the fact that the statute was intended to protect them against unfair competition. The First Circuit noted the intervenor's explanation of the statute's purpose, but chose to ignore it. 39 F.3d at 8.

[35] For examples of searching inquiry into legislative motive in First Amendment cases, see, eg. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217 (searching inquiry into motive necessary in First Amendment free exercise setting); *Wallace v. Jaffrey*, 472 U.S. 38 (1985) (searching inquiry into motive necessary in First Amendment establishment of religion setting); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (searching inquiry into motive necessary even when dealing with unprotected speech).

the responsible use of alcohol. As such, it clearly qualifies as a "substantial" government interest. But Rhode Island's claim that state-mandated ignorance is the way to achieve responsible alcohol use runs headlong into the First Amendment.[36] The First Amendment flatly rejects the statute's jaundiced view of the capacity of American consumers to act responsibly on the basis of truthful information. The very existence of freedom of speech is premised on an assumption that individuals are capable of dealing with the truth. If American consumers cannot be trusted to know the price of a bottle of scotch, how can the same individuals be trusted to make the political judgments necessary to govern a free nation?

Not surprisingly, since *Virginia Pharmacy*, this Court has never upheld a total ban on the dissemination of truthful information about a lawful product in an effort to manipulate consumer behavior. Neither *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), nor *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (U.S.) are to the contrary.

In *Posadas*, this Court upheld a narrow regulation banning advertising of casino gambling "aimed" at natives of Puerto Rico. The original version of the regulation in *Posadas* had flatly banned all advertisement in the Spanish language capable of reaching the attention of residents of Puerto Rico. *Id* at 332-33. As such, it was analogous to the total information ban imposed by Rhode Island in this case. The Superior Court of Puerto Rico struck down the total information ban as violative of the First Amendment. *Id* at 335-36. In its place, the Court substituted an amended regulation that permitted widespread dissemination of truthful information to residents about casino gambling in the Spanish language press, as well as the distribution of promotional material in Spanish, but banned

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[36] A semantic difficulty is concealed in the articulation of Rhode Island's "interest". While Rhode Island asserts a long-range "interest" in temperance, its short term "interest" is consumer ignorance. In testing the sufficiency of the state's interest in censorship under *Central Hudson*, *amici* believe that both long-term and short-term interests must be tested.

promotional advertising "aimed" at natives of Puerto Rico. *Posadas*, therefore, does not support Rhode Island's effort to impose a flat ban on the dissemination of truthful information about prices, since, in *Posadas*, ample alternative means of transmitting the information in question were carefully left open.[37] Moreover, to the extent that dictum in *Posadas* upholds the government's power to use censorship of truthful information to manipulate consumer behavior because consumers cannot be trusted to act responsibly, it is inconsistent with the rationale used by the Court in those few settings where truthful commercial speech has been regulated.

In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for example, a ban on face-to-face solicitation of accident victims by lawyers was upheld, not because consumers could not be trusted with the information, but because the Court feared that the lack of public scrutiny posed an unacceptable risk of misleading speech and overreaching behavior. Once again, in *Board of Trustees of the State University v. Fox*, 492 U.S. 469 (1989), the Court sustained a ban on commercial speech by outsiders in college dormitories, not because the students could not be trusted with the information, but because the presence of outsiders in the dormitory posed a threat to the students' physical safety. Finally, in *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (U.S.), the Court upheld a 30 day moratorium on targeted mail solicitation of accident victims by lawyers. But the Florida ban was not premised on mistrust of the consumer's ability to deal responsibly with truthful information. Indeed, Justice O'Connor's opinion for the Court carefully disavowed "paternalism" and was expressly premised on the widespread availability of information to the protected consumers.

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[37] *Amici* believe that *Posadas* was wrongly decided even when read properly, since absolutely no basis existed to assume that natives of Puerto Rico were less competent to deal with truthful advertising than their North American visitors.

A common thread runs through *Ohralik*, *Fox*, and *Florida Bar*. In each case a consumer's special circumstances were held to support a narrowly tailored regulation that: (1) did not cut off the flow of commercial information to the affected consumers; (2) did not impede the flow of commercial information to the rest of the population; and (3) was strictly limited in terms of time and physical reach. While *amici* believe that *Posadas* can be read narrowly in a manner that is consistent with *Ohralik*, *Fox* and *Florida Bar*, at bottom it stands as the only case in the modern era in which the Court has even arguably upheld censorship based on mistrust of a consumer's ability to deal with truthful commercial speech. In *Coors*, the Court disavowed the most extreme implications of *Posadas*. It is long past time to repudiate any surviving paternalistic invitation to treat consumers as unable to deal responsibly with truthful commercial speech. In any event, neither *Posadas*, *Ohralik*, *Fox* nor *Florida Bar* support a total ban on the flow of truthful commercial information to an entire population in the hope of manipulating consumer behavior.[38]

C. Rhode Island Has Not Demonstrated That Its Censorship Scheme Will Directly and Materially Reduce the Irresponsible Consumption of Alcohol.

Rhode Island has failed to demonstrate that censorship of price information will, in fact, "directly and materially" reduce the irresponsible consumption of alcohol within the meaning of *Central Hudson*. When, as here, First Amendment protection turns on a contested factual question, this Court has made it clear that the judiciary must conduct an independent review of the factual undepinnings of any censorship scheme. *Turner Broadcasting Co. v. FCC*, 114 S.Ct. 2445 (1994); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v.*

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[38] *Amici* believe that the Court erred in *Florida Bar* in treating some Florida residents as too thin-skinned to receive commercial information in the mail that might be of benefit to them.

Florida Board of Accountancy, 114 S.Ct. 2084 (1994). Unfortunately, the court below abdicated its responsibility to conduct a searching review of Rhode Island's claim that banning price advertising materially diminishes the irresponsible consumption of alcohol. Instead, the First Circuit deferred totally to the unsubstantiated hunch of the Rhode Island legislature.[39]

At trial, several experts testified that no correlation existed between price advertising and *per capita* alcohol consumption. See 829 F.Supp. at 544-550. Most tellingly, the *per capita* consumption patterns of states that limited price advertising were shown to be no lower (and sometimes higher) than states that permitted it. 829 F.Supp. at 546. Rhode Island's inability to document a correlation between price advertising and *per capita* alcohol consumption is not a coincidence. It flows from the inherent difficulty of predicting the effect of price advertising on retail prices[40] and from the near impossibility of predicting the effects of small price changes on demand for beverages containing alcohol.[41] Thus, both courts below agreed that, at most, Rhode Island had demonstrated a rational basis for hoping that a ban on price advertising would reduce irresponsible alcohol consumption, but had failed to demonstrate that it would, in fact, do so.

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[39] Deference to legislative fact-finding is particularly inappropriate in this case, since the Rhode Island legislature apparently made absolutely no effort to explore the factual issues before enacting the statute in 1956. See *Sable Comunications, Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Lopez v. United States*, 63 U.S.L.W. 4343 (1995).

[40] For example, in *Bates*, Arizona argued that price advertising would raise the price of legal services. 433 U.S. at 377-78. Rhode Island claims in this case that price advertising will depress retail cost.

[41] Rhode Island's assumption that small price differentials will translate into diminished consumption of alcohol overlooks the fact that the alcohol market is complex and highly differentiated. Thus, changes in price generally result in a shift to other brands or to other types of beverage.

The District Court, recognizing that this Court has consistently required would-be censors to demonstrate that censorship would, in fact, materially alleviate the asserted harm, found that Rhode Island had failed to carry its burden of proof. 829 F. Supp. at 554-55. The First Circuit agreed that Rhode Island was obliged to demonstrate the efficacy of its censorship scheme, but dramatically reduced the weight of the would-be censor's burden. Instead of requiring proof that the censorship scheme would, in fact, reduce irresponsible consumption, the First Circuit asked merely whether it was "reasonable" for Rhode Island to hope that censorship of price information would decrease irresponsible consumption. 39 F.3d at 7-8. In effect, the First Circuit substituted a "rational basis" standard of review more appropriate for testing efforts to regulate behavior for the heightened scrutiny standard associated with review of efforts to censor speech.[42] Compare, *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1510 n.13 (1993) (rejecting rational basis review of speech regulations) with *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096 (1993) (applying rational basis scrutiny to regulation of behavior).[43]

Ordinarily, the majority may regulate behavior in the rational hope that regulatory activity may bring about a desired social result. *Wisconsin v. Mitchell*, 113 S.Ct. 1811 (1993). Where, however, speech is the target of a censor because of allegations that its message leads to undesirable behavior, the

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[42] In fact, the First Circuit's analysis shifts the burden of proof to the speaker. The Court below held that unless petitioner could disprove Rhode Island's assertions, they would remain as a reasonable basis for the censorship. In effect, therefore, under the First Circuit's analysis, a censorship scheme must be upheld unless the speaker disproves all of the censor's assertions. See *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994)

[43] Justice O'Connor's opinion in *Florida Bar, supra*, explicitly eschews rational basis review. WL 365648 (U.S.) at p.3.

government must do more than assert a rational belief that sweeping censorship of truthful information about price will foster responsible use of alcohol. In a commercial speech context, the government must demonstrate that banning truthful information about prices will, in fact, reduce irresponsible alcohol consumption. *Edenfield v. Fane*, 113 S.Ct. 1792 (1993). Both lower courts agree that Rhode Island has failed to carry such a burden.

Prior to the pathbreaking free speech opinions of Justices Holmes and Brandeis,[44] speech could be banned merely because the censor had a rational basis for asserting that it had a "bad tendency" to lead to undesirable behavior. *Gitlow v. New York*, 268 U.S. 652 (1925). The very essence of modern free speech protection is a rejection of the bad tendency/rational basis test in favor of heightened judicial scrutiny of a censor's assertion that speech may be banned because it causes undesirable behavior. In many non-commercial speech contexts, the bad tendency/rational basis test has been supplanted by the "clear and present danger" test. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In the commercial speech area, the heightened causation requirement is reflected by the obligation of a would-be censor to establish that censorship is necessary to directly and materially alleviate the asserted harm. *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980).

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[44] *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes and Brandeis dissenting); *United States ex rel Milwaukee Soc. Democrat Publishing Co., v. Burleson*, 255 U.S. 407, 436-38 (1920) (Holmes, J. dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 337 (1920) (Brandeis, J. dissenting); *Pierce v. United States*, 252 U.S. 239, 272-73 (1920) (Holmes and Brandeis, dissenting); *Schuyler v. United States*, 251 U.S. 466, 482 (1920) (Holmes and Brandeis, JJ. dissenting); *Whitney v. California*, 274 U.S. 357, 372-78 (1927) (Brandeis and Holmes, concurring).

Unfortunately, while the First Circuit claimed to apply First Amendment scrutiny, its analysis resurrects the discredited bad tendency/rational basis test. Rational basis is not, however, the test in a modern First Amendment case. *Discovery Network*, 113 S.Ct. 1510, n. 13. Indeed, adoption of a rational basis/bad tendency standard in commercial free speech cases would drain the term "directly advance" of any meaning. It would virtually eliminate any practical distinction between regulating commercial speech and regulating economic behavior.

Although this Court has not explicitly defined a commercial censor's precise burden of proof, its commercial speech cases apply a heightened test that requires would-be censors to prove that censorship will, in fact, "directly" and "materially" advance the censor's asserted interest. Eg. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977); *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994). Most recently, in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995), Justice Thomas observed that "educated guesses" and "anecdotal evidence" could not substitute for proof of the close nexus that must be shown to exist between commercial speech and harm. 115 S.Ct. at 1593.[45]

Justice Kennedy, writing for eight members of the Court in *Edenfield*, ruled that Florida had failed to demonstrate the requisite causal link between the targeted speech and the

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[45] *Florida Bar, supra*, is not to the contrary. In *Florida Bar*, Justice O'Connor noted that both the need for the regulation and its efficacy were supported by extensive unrebutted factual evidence. In this case, both lower courts are in agreement that the factual underpinnings of the Rhode Island statute have been thoroughly eroded. Only by applying a rational basis standard of review was the First Circuit able to save the statute.

feared feared evil. In words particularly applicable to this case, Justice Kennedy noted:

> This burden [proving that censorship will "directly advance" a governmental interest] is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real *and that its restriction will in fact alleviate them to a material degree.* [citations omitted]. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression. 113 S.Ct. at 1800. (emphasis added).

Of course, that is precisely what is taking place in this case. Unless Rhode Island is held to a significant burden of proving that a ban on price advertising actually fosters temperance, Rhode Island will have succeeded in parlaying a legitimate concern with fostering responsible use of alcohol into an illegitimate exercise in economic protectionism. Under the First Amendment, Rhode Island is obliged to prove not merely that its desire to censor is reasonable; it must prove that that its censorship scheme will succeed.

D. The Scope of Rhode Island's Censorship Program Is Far Broader Than Necessary.

In the commercial speech context, a would-be censor must explore less drastic means of advancing the state's interest without resorting to censorship. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). While the less drastic means requirement in a commercial speech context does not require mechanical invalidation of a regulation merely because other alternatives may exist, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), it does require a careful effort to avoid unnecessary censorship. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990). For example, in *Rubin v. Coors Brewing Co.*,

115 S.Ct. 1585 (1995), Justice Thomas noted that the existence of several alternatives "all of which could advance the Government's asserted interest in a manner less intrusive to [the speaker's] First Amendment rights" provided an independent reason to invalidate the statute. In *Coors*, the most obvious alternative noted by Justice Thomas was direct regulation of alcohol content. Direct regulation is equally available to Rhode Island. If Rhode Island can demonstrate that unduly low prices cause irresponsible consumption of alcohol, Rhode Island may seek to set a state minimum price, just as it has done for cigarettes. R.I. Gen. Laws 6-13-2. While *amici* believe that such an interference with the free market would be unwise, of doubtful constitutionality and unresponsive to the real issues posed by problem drinking, at least it would avoid widespread censorship and would permit the people of Rhode Island to make a decision about the wisdom of price control after an open debate. More constructively, Rhode Island could attack problem drinking head-on by enacting serious programs of education, treatment and law enforcement. For, at bottom, tinkering with the price of alcohol, either directly or covertly via censorship, does nothing about problem drinking. It simply transfers wealth from consumers to favored retailers. When, as here, Rhode Island effects such a wealth transfer through censorship, it violates the First Amendment.

CONCLUSION

For the above stated reasons, the decision of the United States Court of Appeals for the First Circuit should be reversed.

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